SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No 835

ROBERT KENNETH DEWEY,
Petitioner,

vs.

REYNOLDS METALS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes and Regulations involved	2
Questions Presented	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	11
Index to Appendices	i-a

TABLE OF AUTHORITIES CITED

CASES

	Page
Barnett v. Rodgers, 410 F 2d 995	7
Bowe v. Colgate-Palmolive Co., 416 F 2d 711	9
Culpepper v. Reynolds Metals Co., 421 F 2d 888	10
Griggs v. Duke Power Co., 420 F 2d 1225	11
Hutchings v. United States Industries, ... F 2d ..... (1970)	9
In Re Jenison, 375 US 14	7
Jackson v. Veri Fresh Poultry Co., 304 F. Supp. 1276	8
Sherbert v. Verner, 374 US 398	5, 7
Udall v. Hallman, 380 US 1	8
Weeks v. Southern Bell Telephone & Telegraph Co., 408 F 2d 228	8

STATUTES

Civil Rights Act of 1964, Title VII

Section 703(a)(1) (42 US Code Sec. 2000 e-2(a)(1)) 2, 3, 5, 6, 7, 10

Section 706(d) (42 US Code Sec. 2000 e-5(d)) 9

REGULATIONS

Equal Employment Opportunity Commission Guidelines

29 C.F.R. Sec 1605.1 (1967 Regulations).. 2, 5, 6

29 C.F.R. Sec. 1605.1 (1966 Regulations).. 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on June 4, 1970 and the final opinion after the Petition for Rehearing entered on August 11, 1970.

The opinion of the district court denying respondent's motion to dismiss (Pet. App. 9a-16a) is reported at 291 F. Supp 786. The opinion of the district court ruling for petitioner on the merits (Pet. App. 18a-28a) is reported at 300 F. Supp 709. A third opinion of the district court on a motion to stay execution (Pet. App. 29a-35a) is reported at 304 F. Supp 1116. The initial opinions of the court of appeals (Pet. App. 41a-55a) are reported at ..... F. 2d ..... The opinions on petition for rehearing (Pet. App. 57a-63a) are reported at ..... F.2d ..... All of the above are reproduced in the Appendix.

JURISDICTION

The original decision of the court of appeals was filed on June 4, 1970. Rehearing was denied on August 11, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides:

> "It shall be an unlawful employment practice for any employer —
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;"

29 C.F.R. §1605.1 (the 1967 Regulation) provides as follows:

> "§1605.1 OBSERVATION OF THE SABBATH AND OTHER RELIGIOUS HOLIDAYS.
>
> "(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> "(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hard-

ship renders the required accommodations to the religious needs of the employee unreasonable."

29 C.F.R. §1605.1(b)(4) (The 1966 Regulations) provides as follows:

"Where an employee has been previously employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

QUESTIONS PRESENTED

1. Whether an employer engages in religious discrimination in violation of Section 703 (a)(1) of the Civil Rights Act of 1964 if he refuses to make reasonable accommodations to the religious observance of a weekly day of rest by an employee.

2. Whether an employee who has sought arbitration on his claim of wrongful discharge under the labor agreement is barred from bringing an action in a federal district court under the Civil Rights Act of 1964 arising out of the same discharge.

STATEMENT

Petitioner has been a member of the Faith Reformed Church since December 4, 1961 (3a).[1] His faith — the sincerity of which is not contested — prevents him from working on Sundays or asking anyone to work on Sundays

[1] Appendix A is the Stipulation entered into between the parties and filed with the District Court on March 17, 1969.

in his stead (4a-5a). Petitioner was employed by respondent at its Wyoming, Michigan, plant since June 14, 1951, and held various jobs at the plant, culminating with the job of "die repairman," until September 12, 1966, when he was discharged (1a). The work done at the plant is of a "job type," involving the production of aluminum extrusions and aluminum billets for industries such as architecture, building, transportation, aircraft and missiles (1a).

Prior to 1964, the plant operated on a five-day-a-week basis. Subsequently, with increasing volume, the plant's operations were increased to six days a week, with overtime scheduled for a part of the employees on numerous Sundays (2a). Under respondent's collective bargaining agreement with UAW, Local 277 (of which petitioner was a member in good standing), respondent had the right to set overtime schedules and compel employees to work overtime "except when an employee has a substantial and justifiable reason for not working." At the request of the union, respondent in 1965 issued an interpretative statement regarding this provision in which it announced that any employee assigned to overtime could be relieved of that assignment by arranging for another qualified employee to replace him. This system of substitution has been utilized "extensively" in respondent's plant since 1965 in many situations.

Petitioner was first assigned to Sunday overtime work on November 21, 1965, and he refused to work then because of his religious beliefs. He was admonished and told that a repetition of such conduct would lead to disciplinary action. On at least five occasions between January and August, 1966, petitioner was assigned to Sunday overtime work and obtained a replacement. On August 28, 1966, petitioner was again assigned Sunday work, and he refused to request a fellow employee to substitute for him on the ground that the making of such a request would violate his religious beliefs. The same sequence of events occurred with respect to Sunday assignments on September 4 and 11, 1966. On account of these absences, petitioner was discharged from employment on September 12, 1966 (4a-5a). Petitioner had volunteered for overtime on days other than Sunday (4a).

In addition to pursuing various remedies under the labor contract and local civil rights statutes, petitioner filed a charge with the Equal Employment Opportunity Commission alleging that he was the victim of religious discrimination. The Commission (overruling a recommendation of a regional director) found that there was reasonable cause to believe that respondent had engaged in religious discrimination, and it instituted conciliation efforts. When conciliation failed, petitioner began this action in the district court, by filing his complaint based on §703 of Title VII of the Civil Rights Act of 1964 (42 USC §2000e-2(a)(1)) (8a).

On the merits, the district court held that respondent had violated Section 703(a)(1) of the Civil Rights Act of 1964 by discharging petitioner on account of his refusal to work on Sunday or obtain a replacement (18a-28a). The court relied on the interpretative regulation issued by the Equal Employment Opportunity Commission, which requires employers "to make reasonable accommodations to the religious needs of . . . employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(b). The court noted that, as in *Sherbert v. Verner*, 374 U.S. 398 (1963), the petitioner had "been forced to choose between his religion and his job." The court also found that respondent had made "no accommodation whatsoever" to petitioner's religious belief that asking anyone to work on Sunday, in his place "would be as much a sin as working himself on Sunday" and that, under the applicable regulation, respondent had failed to demonstrate "any undue hardship" in accommodating to petitioner's request not to work on Sundays (24a-27a).

A majority of the court of appeals (Weick and O'Sullivan, J.J.) reversed on the ground that there was "nothing discriminatory" in respondent's conduct with respect to petitioner (47a). The majority judges viewed the application of the Equal Employment Opportunity Commission interpretative regulation as *ex post facto* since it was not until July 10, 1967 (48). They also concluded that sufficient accommodation under the regulation had been made by respondent when it generally authorized the use of replacements — a privilege which, according to the

majority petitioner "stubbornly refused to exercise" (49a-50a).

The majority also held that petitioner's district court action was barred because he had initially elected to pursue the arbitration remedy available under the collective bargaining agreement (51a-53a). Circuit Judge Combs dissented on the ground that the respondent had made "no showing" of disruption of work at the plant by accommodation to petitioner's demands and that the Commission's regulation required such an accommodation (53a-55a).

A timely petition for rehearing and suggestion for rehearing *en banc* were filed. Rehearing *en banc* was denied, with Circuit Judges Edwards and McCree dissenting (56a). Consideration of the petition for rehearing by the initial panel resulted in its denial, with the majority stating that "[t]he requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act" (57a). Circuit Judge McCree, (disignated by the Chief Judge to substitute for Judge Combs, who had resigned since the original panel decision) dissented for the reasons stated in Judge Combs' opinion (57a).

REASONS FOR GRANTING THE WRIT

1 (a) The majority of the court below has construed the Civil Rights Act's prohibition against religious discrimination in a manner which conflicts with binding decisions of this Court and with decisions of other United States Courts of Appeals in related areas. In substance, the majority below has held that an employment policy which appears even-handed on its face is not unlawful even though its practical and operational effect is to hinder and discourage faithful observance of religious holidays — notwithstanding the fact that an accommodation to such observances would result in negligible or minor inconveniences to the employer. This holding is recognized by the majority below to be inconsistent with the interpretation given by the Act by the federal agency with which administrative jurisdiction has been vested. The necessary

effect of the decision is to render the hundreds of thousands or millions of Americans whose religious convictions require them to observe Sunday or another day of the week as a day of total rest vulnerable to unjustified economic reprisals on account of their adherence to their faith. It follows that such a rule pressures the faithful and observant adherent of a religious belief to forego the practices commanded by his belief.

This result is plainly forbidden by Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), which prohibits an employer from discharging an employee or discriminating against him "because of such individual's . . . religion." The term "religion" as used in the Act was apparently construed by the majority below as protecting only petitioner's beliefs, and not the practices demanded by these beliefs. The definition of discrimination implied in that conclusion conflicts with this Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963) which holds that the term "religion" as used in the First Amendment extends beyond religious beliefs to observances which do not pose a "substantial threat to public safety, peace or order." 374 U.S. at 403. In the *Sherbert* decision the Court held that only a "compelling" or "paramount" interest would justify the inhibition of a religious practice such as the faithful observance of a day of rest. That principle is as fully applicable here as it was in In *Matter of Jenison*, 375 U.S. 14 (1963), where religious scruples against jury service were summarily determined to be a constitutional bar to a contempt conviction for refusal to serve upon a jury.

(b) The decision of the majority below also conflicts in principle with the decision of the Court of Appeals for the district of Columbia Circuit in *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969), where it was held that prison officials were constitutionally obliged to accommodate to the conscientious religious dietary practices of prisoners in the absence of compelling justifications. In the *Barnett* case the request that the prison offer "one full-course pork-free diet once a day" was held to constitute "modest . . . official deference to . . . religious obligations" which would be constitutionally required. 410 F.2d at 1001. Surely the obligation that the employer select a substitute for peti-

tioner is far more "modest" than the requirement in *Barnett*.

Nor is there merit to the assertion in the opinion below that respondent did make "a reasonable accommodation to the religious needs of its employees" by permitting petitioner to obtain a replacement. The "replacement system" was no accommodation whatever to petitioner's conscientious scruples against personally asking other employees to work on Sunday.

(c) The flat rejection by the majority below of the Equal Employment Opportunity Commission's considered interpretation of the statute conflicts with this Court's ruling in *Udall v. Tallman*, 380 U.S. 1, (1965) that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." 380 U.S. at 16. It also conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (1969), where similar interpretative guidelines relating to discrimination on account of sex were sustained and applied on the authority of *Udall v. Tallman, supra*.

(d) The decision of the majority below conflicts squarely with the unappealed decision of the United States District Court for the Eastern District of Louisiana in *Jackson v. Veri Fresh Poultry Co.*, 304 F.Supp. 1276 (1969), where Section 703(a)(1) of the 1964 Act was held to have been violated by the discharge (on November 16, 1966) of a Seventh-Day Adventist because her religious convictions prevented her from working between sundown on Friday and sundown on Saturday. In that case, the interpretative regulation of the Equal Employment Opportunity Commission (also issued, as here, *after* the date of the discharge) was sustained in its application to the case. And the court relied explicitly on the decision of the district court in this case, which it found "strikingly similar" to the facts before it. 304 F.Supp. at 1278. Although the *Jackson* decision was not appealed to the Court of Appeals for the Fifth Circuit, it stands as the leading decision on the meaning of the statutory provision in the largest urban center in the Circuit. Consequently the effects of the con-

flict between the decision below and that in the *Jackson* case is every bit as serious to the orderly administration of this important statute as if the *Jackson* case had been decided by the Court of Appeals.

2 (a) The majority below recognized that its decision on the election-of-remedies issue conflicted with decisions of the Seventh and Fifth Circuits in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (1969), and *Hutchings v. United States Industries*, ... F.2 ..... (1970) respectively (61a). In this case, petitioner was first subjected to a disciplinary layoff after his failure to work on Sunday, September 4, 1966, and his refusal to obtain a replacement for that day. He filed a grievance under the labor contract on September 7, 1966. He was discharged after again refusing to work on Sunday, September 11, 1966. On September 16, 1966, he filed a complaint with the Michigan Civil Rights Commission and three day later, on September 19, 1966, he filed another grievance under the labor contract. On December 13, 1966, the Michigan Commission dismissed his complaint, and on January 4, 1967, petitioner filed, within the time provided by Section 706(d) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(d), a complaint with the Equal Employment Opportunity Commission. Petitioner's labor-contract grievances were finally decided on June 29, 1967.

To say that this course of action — in which the State and Federal civil-rights remedy for discharge was even sought *before* the filing of the labor-contract grievance — should amount to an "election" of the Grievance Procedure is plainly unsound. The important policies underlying the decisions of this Court sustaining labor arbitration procedures are totally inapplicable to an employee who primarily and actively pursues statutory civil-rights remedies and only secondarily requests the employer and the union to correct the infringement of his rights under the labor agreement. The labor agreement and the statute protect against different violations. Even if the labor agreement was not violated by the discharge of petitioner, the matter of the violation of petitioner's rights protected by the Act is a separate question to be determined in entirely different procedures established by the Act. Hence there is no basis

in reason for requiring an employee such as petitioner to "elect" between remedies; he may pursue both to determine whether either of two distinct protections granted him have been infringed.

(b) The majority below curiously approved the language of the Court of Appeals for the Fifth Circuit in *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970), but failed to see its obvious relevance to this case:

> Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not just with an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. *It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.* (emphasis added)

Title VII of the Civil Rights Act of 1964 was adopted to end not merely racial discrimination in employment, but also discrimination based upon religion, national origin and sex. In each of these areas, "the ability to provide decently for one's family in a job or profession" is involved, and as to each the Act "provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination." The legal issues presented by this case are, therefore, of the same degree of importance as those in *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), in which this Court granted certiorari on June 29, 1970, to determine whether the use of non-job-related tests operates to achieve racial discrimination within the reach of Section 703(a) of the Civil Rights Act of 1964.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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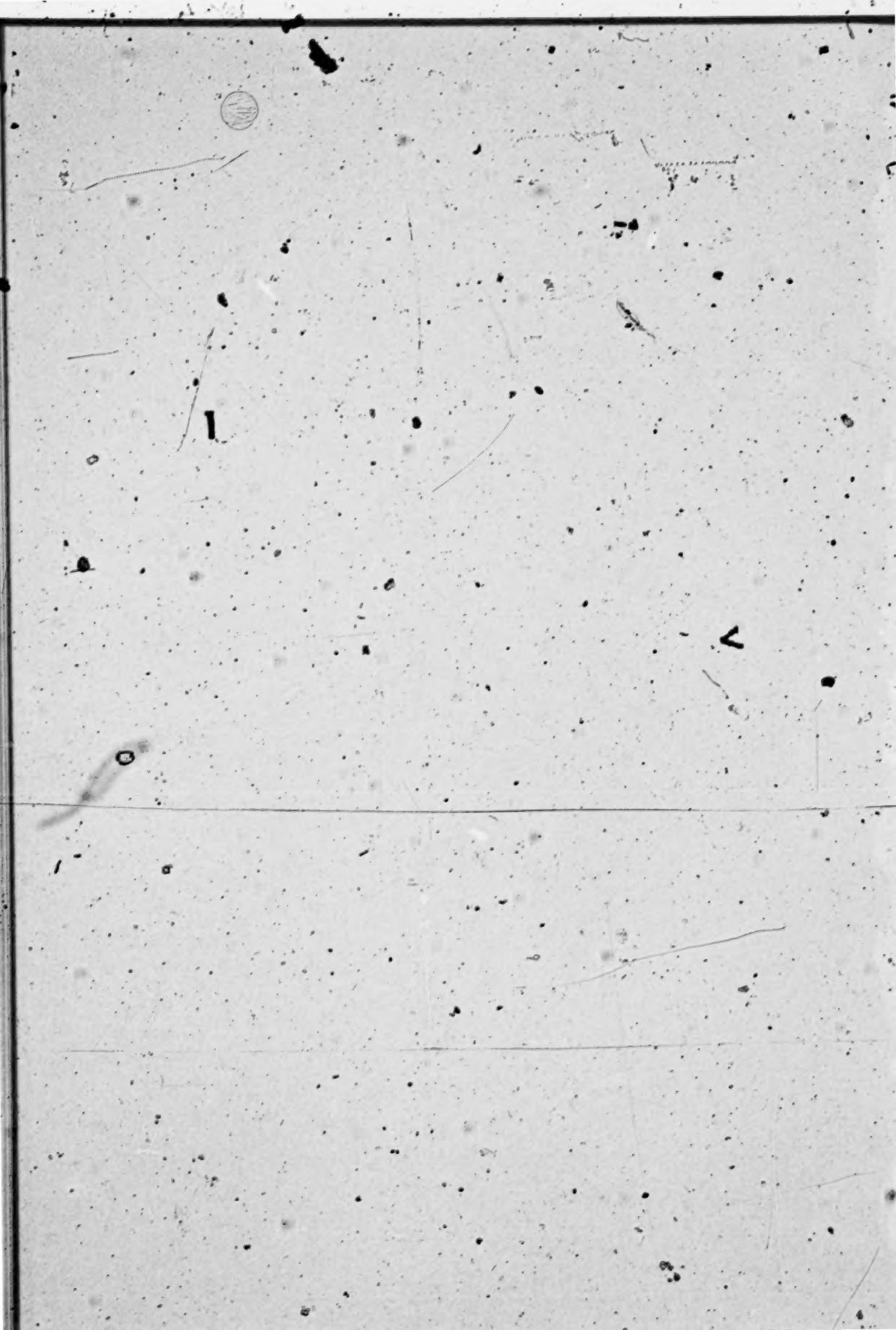

TABLE OF CONTENTS.

	Page
Appendix A — Stipulation of Facts	1a-8a
Appendix B — District Court Opinion Denying Defendant's Motion to Dismiss	9a-16a
Appendix C — District Court Order	17a
Appendix D — District Court Opinion	18a-28a
Appendix E — District Court Opinion on Motions for Entry of Judgment and Stay of Judgment	29a-35a
Appendix F — District Court Judgment Granting Permanent Injunction, and Reinstatement, Credit for Seniority and Fringe Benefits, and Back Pay	36a-40a
Appendix G — Opinion of the United States Court of Appeals for the Sixth Circuit	41a-55a
Appendix H — Court of Appeals Order	56a
Appendix I — Court of Appeals Opinion on Petition for Rehearing	57a-63a

APPENDIX A

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT KENNETH DEWEY,
Plaintiff,

vs. Civil Action No. 5889

REYNOLDS METALS COMPANY,
Defendant.

STIPULATION OF FACTS
(Filed March 17, 1969)

NOW COMES the Plaintiff by his attorneys, Vander Veen, Freihofer & Cook and the Defendant by its attorneys Cross, Wrock, Miller & Vieson, and hereby mutually stipulate and agree that the following facts are true and that proofs need not be presented at the trial of the within cause in support of the matters to which the parties hereby stipulate.

1. Plaintiff was employed by Defendant at its Wyoming, Michigan plant on June 14, 1951, holding various jobs until he became a die repairman, which was the job he held at the time of his discharge September 12, 1966.

2. Defendant is a corporation with its executive offices in Richmond, Virginia and maintains a "job type" plant in Wyoming, Michigan where it produces on an order basis aluminum extrusions and aluminum billets for such industries as architecture, building, transportation, aircraft and missile.

3. Prior to 1964 the plant operated on a five day weekly schedule. Because of increased business, during 1964 and 1965 the plant operated on "five plus" days weekly schedule. During late 1965 and 1966 the plant operated on a "six plus" days weekly schedule utilizing Saturdays regularly and requiring numerous Sunday work schedules. Between January 1, 1966 and September 11, 1966, Sunday production took place on twenty-four (24) of thirty-seven (37) Sundays.

4. The production and maintenance employees at Defendant's plant (which classifications include that of Plaintiff) have been and continue to be represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (now known as UAW) and its Local 277 (hereinafter called the Union).

5. Plaintiff was at all times during his employment by Defendant a member of the Union in good standing.

6. Prior to the 1960 Labor Agreement between Defendant and the Union, overtime was performed on a basis that was voluntary on the part of each employee and under such circumstances the scheduling of production was made impossible on certain overtime days.

7. The 1960 Labor Agreement and subsequent Labor Agreements, including the 1965 Labor Agreement, between Defendant and the Union include a section giving Defendant the right to set overtime schedules and make it compulsory for the employees to work such schedules unless they have a substantial and justifiable reason for not doing so. The section in question in the 1965 Labor Agreement is found at Article IX, Section 3, and reads as follows:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required

to work more than twelve (12) continuous hours without his consent."

(Exhibit A attached hereto).

8. The 1965 Labor Agreement also provides, in Article IX, Section 4, that overtime work shall be divided as equally as possible among employees in each job classification in each department; that if less than all of the qualified employees in a classification in a department are needed on other than a normal straight time work day, the number required will be scheduled in accordance with the overtime chart and when the required number of employees cannot be obtained in this manner, overtime is to be assigned by the Defendant Employer among the employees who are offered such overtime in the inverse order of their seniority.

9. In response to a Union objection to the compulsory overtime clause, the Defendant Employer under date of September 20, 1965, issued an interpretation of the Labor Agreement which said in effect that any employee assigned to overtime could be relieved from that assignment by arranging for another qualified employee to replace him. This system of employees furnishing their own replacements has been utilized extensively since September 1965. (Exhibit B attached hereto).

10. Defendant established in 1957 Plant Rules and a copy of such Rules was posted in each department. Plant Rule 11 includes "absence from work without reasonable cause" and calls for a warning for the first offense, a one week layoff for the second offense and discharge for the third offense. Said Plant Rules also state: "Depending upon the seriousness of the offense and other factors in the judgment of Management, the Company reserves the option of imposing a lesser penalty than that indicated." (Exhibit C attached hereto).

11. Plaintiff has been a member of the Faith Reformed Church since December 4, 1961. This church is a local church in the Reformed Church of America.

12. Plaintiff never volunteered for Sunday overtime work from December 4, 1961 to date of discharge because of his religious beliefs.

13. Plaintiff did volunteer for overtime work on days other than Sunday since becoming a member of the Faith Reformed Church.

14. Plaintiff was scheduled to work overtime on Sunday, November 21, 1965 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs; he was given a verbal warning; was advised of the necessity (in Defendant's judgment) of Defendant scheduling work on a seven day basis and was advised that a repetition of his conduct would lead to disciplinary action under Plant Rule 11.

15. Plaintiff was scheduled to work overtime on at least five (5) Sundays from January 1966 to August 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff did not work on such assigned days but did obtain replacements on each of the days in question in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto.

16. Plaintiff was scheduled to work overtime on Sunday, August 28, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs and refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto. At this time Plaintiff told a fellow employee, Jake Zagman, who had been serving as his replacement that Plaintiff would not request said fellow employee to serve as his replacement again. Plaintiff was given a written warning for violation of Plant Rule 11. (Exhibit D attached hereto). Seven (7) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-five (255) employees in the plant, one hundred ninety (190) worked.

17. Plaintiff was scheduled to work overtime on Sunday, September 4, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs and refused because of

his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto. Plaintiff was given a written warning together with a disciplinary layoff of three (3) days for violation of Plant Rule 11. (Exhibit E attached hereto). Four (4) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-three (253) employees in the plant, one hundred seventeen (117) worked.

18. Plaintiff filed Grievance No. 621 dated September 7, 1966 with Defendant. (Exhibit F attached hereto).

19. Plaintiff was scheduled to work overtime on Sunday, September 11, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff again refused to work because of his religious beliefs and also refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 and as more specifically set forth in Exhibit B attached hereto. Plaintiff was discharged for violation of Plant Rule 11. (Exhibit G attached hereto). Five (5) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-eight (258) employees in the plant, one hundred twenty-four (124) worked.

20. Plaintiff filed Grievance No. 629 which was received by Defendant's Personnel Department on September 19, 1966. (Exhibit H attached hereto).

21. Both the Defendant's interpretation and past practice indicate that the Defendant cannot compel an employee to accept an overtime assignment in other than his own classification.

22. On and after August 28, 1966 there were two (2) employees who were in other classifications, but who nonetheless were qualified as die repairmen.

(a) One of the aforementioned employees, Jake Zagman, worked on August 28, 1966 and on September 4, 1966. Zagman did not work on September 11, 1966

but was available for work; however, Defendant could not compel Zagman to work outside his classification.

(b) William Boyer, the second of the two aforementioned employees, worked on August 28, 1966 and on September 11, 1966. Subsequent to September 4, 1966 but prior to September 11, 1966 he had been reclassified as a die repairman and worked in such capacity on September 11, 1966. Boyer did not work on September 4, 1966 but was available for work; however, Defendant could not compel Boyer to work outside his classification.

23. If Plaintiff were to be relieved of the obligation of obtaining his replacement in accordance with the replacement system referred to in Paragraph 9 above, it is Defendant's contention that this would result in a waiver of the compulsory overtime provisions of the Labor Agreement.

Further; Plaintiff does not by this Stipulation intend agreement with or acceptance of Defendant's contention; but rather, the parties have so stipulated in order to include that which Defendant included as a defense in its Answer No. 24 to Plaintiff's Interrogatory No. 24, which Answers and Interrogatories have hereinbefore been filed.

24. *The sincerity of Plaintiff's personal religious beliefs* is not contested by the Defendant.

25. Plaintiff had expressed his religious beliefs against Sunday work to the Defendant—prior to having been scheduled for the above three (3) Sundays in 1966.

26. Prior to the discharge of Plaintiff, Defendant had taken disciplinary action as to a number of other employees who refused overtime work assignments on Sunday because of their religious beliefs when scheduled pursuant to the compulsory overtime provisions of the Labor Agreement. The following are the disciplinary actions taken: Written warnings were issued to four (4) employees; three (3) day layoffs were given to three (3) employees; four (4) employees were discharged, which number included two (2) supervisors. Defendant had also taken disciplinary action

as to other employees who refused overtime work assignments on days other than Sunday when scheduled pursuant to the compulsory overtime provisions of the Labor Agreement.

27. Pursuant to the Collective Bargaining Agreement between Defendant and the Union, Plaintiff's grievances pertaining to his three (3) day layoff and his discharge were processed through the various steps of the Grievance Procedure, finally resulting in the grievances being submitted to arbitration. Under date of June 29, 1967 the arbitrator sustained the layoff and the discharge and denied the grievances. (Exhibit I attached hereto).

28. During the period 1960 to 1966 inclusive, no employee employed by Defendant at its Wyoming plant in the die repair classification refused to work on Sunday because of religious beliefs and refused to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above, except the Plaintiff Dewey.

29. On or about September 16, 1966, Plaintiff filed with the Michigan Civil Rights Commission an application for the issuance of a Complaint alleging that he had been subjected to discriminatory treatment and discharged because of religious beliefs. Defendant was advised of the filing of such application by letter from the Civil Rights Commission dated September 19, 1966. (Exhibit J attached hereto).

30. Under date of December 13, 1966 (mailed on December 14, 1966), the Michigan Civil Rights Commission issued a Notice of Disposition and Order of Dismissal stating that the Commission had found insufficient grounds on which to issue a Complaint and that the application for Complaint was denied. (Exhibit K attached hereto).

31. Under date of January 4, 1967, Plaintiff filed a charge with the Equal Employment Opportunity Commission alleging discrimination on the basis of religion. (Exhibit L attached hereto). The charge was served on Defendant on July 19, 1967.

32. Under date of January 5, 1968 the Equal Employment Opportunity Commission, notwithstanding the recom-

mendation of the Regional Director of the Cleveland, Ohio Regional Office, that the Equal Employment Opportunity Commission find no probable cause, issued a letter to Defendant Employer stating that the Commission had determined that there was reasonable cause to believe that Defendant Employer had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964. (Exhibit M attached hereto).

33. Following conciliation efforts by the Equal Employment Opportunity Commission, said Commission in a letter dated May 3, 1968 advised Plaintiff of the failure of conciliation efforts and notified Plaintiff that he could within thirty (30) days institute a civil action in the appropriate Federal Court alleging an unlawful employment practice. Within thirty (30) days after said letter, Plaintiff commenced this action.

34. The foregoing Stipulation is intended to cover all facts except those relating to Plaintiff's alleged damages. If the parties are not able to stipulate as to such alleged damages, there will be a further hearing covering the matter of damages.

Respectfully submitted,

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APPENDIX B

(In the United States District Court for the Western District of Michigan, Southern Division — No. 5889)

OPINION DENYING DEFENDANT'S MOTION TO DISMISS

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC §2000(e), which provides, *inter alia*, for relief against religious discrimination in employment.

Plaintiff, Robert Dewey, was employed by defendant from July 14, 1951, until September 12, 1966. Dewey held a number of jobs with defendant; at the time of his termination he was employed as a die repairman. Since 1962, plaintiff has been a member of the Reformed Church, and, consistent with his religious beliefs as a member of that church, he has refused to work on Sundays.

In 1960, a new labor-management agreement was executed between the UAW-AFL-CIO and defendant Reynolds Metals Co. That agreement provided that the company could schedule compulsory overtime work, including Sundays. This provision was carried forward in the 1965 labor-management agreement, which was in effect at the time of the termination which is the basis of this action.

From 1960 until late 1965, the compulsory overtime provision was not exercised and the company functioned on a five-day work week schedule. Late in 1965, the defendant began scheduling Sunday overtime, and in a bulletin dated September 20, 1965, the defendant agreed to allow employees to be relieved of Sunday work if they obtained a qualified replacement.

Dewey was scheduled to work on August 7, 1966, and August 14, 1966, both Sundays. Defendant alleges that, at plaintiff's request, a fellow employee worked as his replacement under the provisions of the bulletin dated September 20, 1965. However, Dewey did not report for work

on August 28, 1966, September 4, 1966, or September 11, 1966, all Sundays, having previously made it expressly known to the defendant that it was against his religious beliefs to work on Sundays and that he would not procure a substitute because it was his belief that if it was not right for him to work on Sundays, it would not be right to encourage another to work, regardless of the substitute's religious beliefs. Plaintiff said that the company should obtain a substitute so as to accommodate his religious beliefs.

The September 11 absence resulted in a third written offense and plaintiff was terminated pursuant to Company Rule 11. Believing that he had been discriminatorily discharged because of his religion, plaintiff filed a grievance to this effect, in accordance with the provisions of the 1965 collective bargaining agreement. The grievance was processed through various stages of the grievance procedure and was decided adversely to the plaintiff. An arbitration hearing was held April 27, 1967, and in an opinion and award dated June 29, 1967, arbitrator Mark L. Kahn decided against plaintiff. At the hearing, plaintiff was represented by the union in the persons of the International Representative and the chairman of the bargaining committee. He was not represented by an attorney, although the company was. A post-hearing brief was filed by the company, but no brief was filed by the union.

The arbitrator's decision was based in part on "the fact that a grievance protesting the discharge of Knight [another employee] in August 1966 for refusing Sunday work on religious grounds was later withdrawn [by the union]." (Arbitration award, at 8.)

Another reason given was the finding of the arbitrator that "the agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds." (Arbitration award, at 8.)

Plaintiff thereupon filed a similar charge with the Michigan State Civil Rights Commission. The Commission found that there were insufficient grounds upon which to issue a complaint against defendant.

Plaintiff then filed a charge with the Equal Employment Opportunity Commission alleging that he had been dis-

criminated against because of his religion. The Commission investigated the charge and determined that there was reasonable cause to believe that the employer had violated the provisions of Title VII. The Commission, unsuccessful in its attempts to obtain a conciliation agreement, notified the plaintiff of his right to bring a suit under Section 706 of the Act. This suit was instituted on May 31, 1968, and it is now before the court on a motion filed by defendant to dismiss the complaint on the ground that the plaintiff, by pursuing the grievance procedure under the collective bargaining agreement, had made a final, binding election of remedies and is therefore precluded from maintaining a suit to enforce his rights under Title VII.

The relevant legal issues easily divide into two: (1) whether by pursuing the grievance procedure to a conclusion, plaintiff made an election of forums which now precludes his suit in this court; (2) whether the constitutional guarantee of freedom of religion permits this court to review the arbitrator's decision or make a decision on the merits. Each of these issues will be discussed in turn.

I.

Defendant argues that by pursuing his remedy under the grievance procedure, plaintiff made a binding election of forums. Defendant relies on Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), which granted a motion to dismiss in a case involving a discharge for alleged improper discrimination based on sex. That court said at pages 337-338:

> "It is also the belief of the court that the employee should not be permitted to proceed on the same allegedly wrongful incidents both in the court and pursuant to his contractual remedies."

The reason for this requirement of an election was that "it would be inequitable and unconscionable to subject the defendant Colgate to two series of extensive litigation, one series in this court and then another series under the labor contract." Id. at 366-7.

The second case relied upon by defendant is Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal. 1968). That case involved a charge of racial discrimination, and the court refused to go as far as the court in Bowe, supra. In Washington, a settlement had been reached between the union and the company prior to arbitration. The court held that once that settlement was accepted by both sides, the employee would be precluded from continuing with any court action under the Civil Rights Act.

Both these cases are distinguishable from the case at bar. The Bowe case dealt with alleged discrimination on the basis of sex, whereas this case deals with a discrimination against the freedom of religion, one of the most cherished and protected constitutional rights. Washington involved a settlement agreed to by both sides, a far different situation than is presented in this case. Both decisions are now on appeal.

In addition to being distinguishable, these cases should be critically analyzed to determine whether their reasoning is valid. The reasoning given by the Bowe court itself argues against the decision in that case:

> "The court finds a fundamental difference between a claim for the violation of a collective bargaining agreement and a claim for the violation of the Civil Rights Act of 1964. The latter is a statutory embodiment of constitutional rights that all persons are entitled to enjoy, while the former has as its primary purpose the maintenance of industrial peace between labor and management. It is the belief of the court that an employee has the right to come before the court and assert his right under the Civil Rights Act of 1964 without regard to any contractual remedies also available to him." 272 F. Supp. at 337.

The doctrine of election of remedies has traditionally been applied in cases where the same or nearly identical issues were being pursued in two forums. See, e.g., Penn Gen. Cas. Co. v. Commonwealth of Pa., ex rel Schnider, 294 U.S. 189 (1935). This doctrine has also been used in

the labor field relative to proceedings both before an arbitrator and then before the National Labor Relations Board on the same issue. The standards set forth in Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Raytheon Co., 140 NLRB 883 (1963), are instructive: (1) The factual issues before the arbitrator and the Board must be identical; (2) the hearing and evidence presented must deal adequately with all factual issues; (3) the arbitrator must have decided the factual issues involved before the Board; (4) the hearing must be fair and regular in all respects; (5) the decision of the arbitrator must be in accordance with the law.

The factor to be emphasized in the instant case is whether the arbitration hearing dealt with the same issues that are present in this proceeding before this court. The issues treated by the arbitrator were wholly different from the issues raised in this Civil Rights Action. The labor contract involved, Article XI, Section 2, Step 5, stated:

> "The arbitrator shall have authority to interpret this agreement for the purpose of settling the grievance, but he shall have no authority to add to or detract from, or change this agreement, or arbitrate wages for new changes, jobs, or production standards."

Under this provision of the contract, the arbitrator correctly limited himself to the contract language. At no time did the arbitrator deal with the issues present in this case, that is, the issues relevant to the Civil Rights Act and the First Amendment.

It is understandable that any union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first through arbitration is in accord with federal labor law. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). Plaintiff should not be penalized for first proceeding with his contractual remedies through the arbitration process, as preferred and indeed mandated by federal labor law. He should retain his rights to also bring a civil rights action. This reasoning

is especially justified in this case, where the employee was not represented by counsel at the arbitration hearing, although the company was, and where the union did not file a brief on behalf of the employee though the company filed a brief on its behalf.

Under all these circumstances, the arbitration award should not preclude an action in this court based upon a statute rather than the collective bargaining agreement. To hold otherwise would be to require the employee to have come to this court without attempting a settlement through the contractual processes, as preferred by the national labor law; plaintiff would also have been required to choose between two different remedies when both remedies are provided to insure that plaintiff's contractual, statutory and constitutional rights are protected. When rights of this type are involved, they outweigh the interest of the company-defendant in avoiding the inconvenience and expense of multiple actions. Thus, a trial should be held on the merits of plaintiff's claim that defendant has violated the Civil Rights Act.

II.

Defendant argues that the First Amendment does not apply to labor contracts or proceedings thereunder, because they are not actions of the government, but are rather purely private activities. Defendant further argues that even if the First Amendment could be said to apply to this situation, the decision of the arbitrator should be final and conclusive with respect to plaintiff's First Amendment rights.

Both defendant's arguments are invalid. First, the arbitration proceeding cannot be viewed as purely a private one. The National Labor Relations Act and the famous Triology cases[1] clearly establish a federal labor policy of arbitration as a substitute forum for the public judiciary in which to dispose of industrial disputes.

---

[1] United Steelworkers v. American Mfg. Co., v. Warrior & Gulf Nav. Co., v. Enterprise Wheel & Car Corp., 363 U.S. 564 (1960).

Since the arbitration tribunal or arbitration proceedings are in many instances a substitute for traditional judicial remedies, it follows that the rules of due process and other constitutional protections must extend to the substitute proceedings lest the courts, through approval of arbitration agreements in arbitration proceedings, support proceedings which result in the deprivation of statutory and constitutional rights. If this grievance-arbitration system, which exists as a result of court approval, is permitted to dispose of disputes involving substantial rights without heeding constitutional protections, the courts will find themselves supporting and giving credence to decisions, which if rendered by the courts would be a violation of the free exercise of religion clause of the First Amendment or some other essential constitutional protection.

The courts cannot leave to the arbitrator final decisions regarding constitutional rights. This is especially true in the instant case, where the arbitrator was limited to the contract in rendering his decision.

This court is not limited by the contract, but also has before it the Civil Rights Act and the Constitution of the United States. The constitutional issue is not one which can be passed over lightly, as was done by the arbitrator in a sentence of two. The constitutional issue is whether defendant effectively denied plaintiff the right of his religion by conditioning plaintiff's right to work on his willingness to forego his religious beliefs or to compromise them by encouraging someone else to work on Sunday. An analogous choice of this type was found to be unconstitutional in Sherbert v. Verner, 374 U.S. 398 (1963), where a Seventh Day Adventist was forced to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand.

The court at this time is not expressing an opinion as to the validity of plaintiff's claims. The court is rather refusing to allow a decision by the arbitrator to be the final one with respect to plaintiff's constitutional rights. The right in question, freedom to exercise one's religion, is too precious to require plaintiff to accept an arbitrator's decision regarding it. Again, the guiding principle is

that plaintiff should not be penalized and should not be precluded from his rightful statutory and constitutional remedies because he followed the mandated practice under federal law of first submitting his dispute to the private grievance procedure.

For all these reasons the motion to dismiss is denied.

Dated: November 5, 1968.

(s) Noel P. Fox
District Judge

CLERK'S OFFICE
United States District Court
for the
Western Dist. of Mich.

There was entered on the docket Oct. 18, 1968 an order in accordance with opinion of the Court denying defendant's motion for dismissal.

Howard T. Ziel, Clerk
(s) G. E. Larink, Dep. Clerk

APPENDIX C

(In the United States District Court for the Western District of Michigan, Southern Division — No. 5889)

ORDER

At a session of said Court held at the City of Grand Rapids, this 18th day of October, 1968.

PRESENT: Honorable Noel P. Fox, District Judge.

THIS CAUSE came on to be heard on the Motion of Defendant for dismissal for failure to state a claim upon which relief can be granted for the reason that Plaintiff made a binding election of forums; and it appearing to the Court that, for the reasons stated in the Court's opinion, Plaintiff did not make a binding election and therefore,

IT IS HEREBY ORDERED that Defendant's Motion pursuant to F.R.C.P. 12(b) (6) is hereby denied.

Dated: October 18th, 1968.

(s) Noel P. Fox
United States District Court Judge

APPENDIX D

(In the United States District Court for the Western District of Michigan. Southern Division — No. 5889)

OPINION
(Filed June 6, 1969)

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC §2000(e), which provides, among other things, for relief against religious discrimination in employment. The parties have stipulated to the facts, the most pertinent of which are set forth below.

Plaintiff, Robert Dewey, was employed by defendant at its Wyoming, Michigan plant on June 14, 1951, and held various jobs until he became a die repairman, which is the job he held at the time of his discharge on September 12, 1966.

Defendant's Wyoming facility is a "job type" plant which produces aluminum extrusions and billets on an order basis. Before 1964 the plant operated on a five-day weekly schedule. Because of increased business, during 1964 and 1965 the plant operated on a "five plus" days weekly schedule. This increased to "six plus" days by 1966, with numerous Sunday work schedules.

Plaintiff was a member in good standing of the U.A.W. Union, Local 277, which represents the production and maintenance employees of defendant's plant.

Before the 1960 Labor Agreement, overtime at the plant was performed on a voluntary basis, and under such circumstances scheduling of production was made impossible on certain overtime days. In 1960, and to the present time, the agreements have included a section giving defendant the right to set overtime schedules and make it compulsory for the employees to work such schedules unless they have a substantial and justifiable reason for not doing so. This section in the 1965 Labor Agreement is Article IX, Section 3:

"All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

The agreement also provides, in Article IX, Section 4, that overtime work shall be divided as equally as possible. If fewer than all qualified employees are needed, the number required is to be scheduled with the overtime chart, and if more employees are needed, they are assigned in the inverse order of their seniority.

In response to a Union objection to the compulsory overtime clause, defendant on September 20, 1965, issued an interpretation of the Labor Agreement which said in effect that any employee assigned to overtime could be relieved from that assignment by arranging for another qualified employee to replace him. This system has been utilized extensively.

Since December of 1961, plaintiff has been a member of the Faith Reformed Church, affiliated with the Reformed Church of America. After joining this church plaintiff never volunteered for Sunday overtime work, although he did volunteer for other days.

Plaintiff was scheduled to work overtime on Sunday, November 21, 1965, pursuant to the compulsory overtime provisions of the Labor Agreement. He refused to work because of his religious beliefs; he was given a verbal warning; and he was advised of the necessity of a seven-day operation and that a repetition of his conduct would lead to a disciplinary action under Plant Rule 11. This rule prohibits "absence from work without reasonable cause," and provides a three-offense progression of punishment, with discharge for the third offense.

On the next five Sundays which plaintiff was required to work, between January and August 1966, he instead obtained qualified replacements in the manner described, supra. But on August 28, 1966, when again required to work on Sunday, plaintiff refused to work because of his religious

beliefs and refused because of his religious beliefs to obtain a replacement. He told Jake Zagman, a fellow employee who had been serving as his replacement, that he would no longer ask Jake to replace him. Plaintiff was given a written warning of violation of Plant Rule 11.

There is no dispute that these religious beliefs of plaintiff are sincere. These beliefs were expressed by plaintiff to the defendant before the first time he refused to obtain a qualified replacement. Plaintiff honestly believes, as a part of his religion, that he should not work on Sunday, and that he also should not induce anyone else to work on Sunday.

Consequently, on the next Sunday which plaintiff was required to work, September 4, 1966, he refused to work or to obtain a replacement. He was given a written warning and a disciplinary layoff of three days. Plaintiff again refused to work on Sunday, September 11, 1966, and was discharged for violation of Plant Rule 11.

On all the above-mentioned Sundays there were several qualified die repairmen available to work, although defendant states that two of these men could not be compelled to accept such an overtime assignment, since it was outside their job classification.

Before plaintiff's discharge, defendant had taken disciplinary action as to a number of other employees who refused overtime work assignments on Sunday because of their religious beliefs, as well as disciplinary action against employees who refused overtime on days other than Sunday.

Plaintiff filed a grievance upon his discharge, but his grievance was denied at every step of the procedure, including arbitration. The arbitrator considered only the contract, and neither the Civil Rights Act nor the Constitution was before him. Plaintiff then proceeded to the Michigan Civil Rights Commission, which denied his complaint due to insufficient grounds. Plaintiff then filed a charge with the Equal Employment Opportunity Commission, which issued a letter to defendant stating that the Commission had determined that there was reasonable cause to believe that defendant had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964.

This action was brought upon failure of conciliation efforts. In November of 1968, this court denied defendant's motion to dismiss, 291 F.Supp. 786.

These are the facts that have been established. Before stating the law and applying it to these facts, it is well to note the facts which have not been brought before the court. There is no evidence that defendant would suffer any hardship should plaintiff prevail in this case. There is no evidence concerning what the effects would be of an accommodation by defendant to the religious beliefs of plaintiff. Could defendant continue to operate on Sunday? Would production be affected? These questions, and others like them, remain unanswered even though the parties have been given ample opportunity to present evidence concerning facts which were not possible to stipulate.

Because an application of Title VII of the Civil Rights Act of 1964, 42 USC §2000(e) will permit the court to decide the case, it is not necessary to reach the question of whether plaintiff's constitutional rights have been violated.

Section 703(a)(1) of the Act, 42 USC §2000(e)-2(a)(1), provides:

> "It shall be an unlawful employment practice for an employer —
>
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . ."

The Act makes exception to this rule only in those instances where religion is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 USC §2000(e)-2(e). That exception has not been alleged, and clearly does not apply to the manufacture of aluminum extrusions.

To further the purposes of the Act, the Equal Employment Opportunity Commission was formed. 42 USC §2000(e)-4. The Commission was given power not only to aid the enforcement of the Act, but also to promulgate regulations consistent with the provisions and purposes of the Act. 42 USC §2000(e)-12(a). Regulation Section 1605.1 is directly applicable to this case:

"Section 1605.1 Observance of Sabbath and other religious holidays.—(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

Great weight should be given to this regulation, as the Supreme Court emphasized in Udall v. Tallman, 380 U.S. 1, 16 (1965):

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n. v. Aragon,* 329 US 143, 153, 91 L ed 136, 145, 67 S Ct 245. See also, e. g., *Gray v. Powell,* 314 US 402, 86 L ed, 301, 62 S Ct 326; *Universal Battery Co. v. United States,* 281 US 580, 583, 74 L ed 1051, 1054, 50 S Ct 422. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." *Power Reactor Co. v. International Union of Electrical, etc.* 367 US 396, 408, 6 L ed 2d 924, 932, 81 S Ct 1529.

In considering the law to be applied, the effect of the labor-management agreement must be determined. The agreement prescribes a certain procedure for assignment of overtime and for disciplinary discharge. If the procedures provided are lawful, defendant would prevail. If they are unlawful, the fact that it is a labor-management agreement will not validate the procedures. An agreement which violates a provision of the federal constitution or of a constitutional federal statute, or which cannot be performed without violating such a provision, is illegal and void. *Ewart v. Bluejacket,* 259 U.S. 129, 138 (1922); *Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540 (1902); 17 Am.Jur.2d, Contracts §165 (1964).

The issue is thus not changed by the existence of a contract. If the procedures used are discriminatory, the plaintiff is entitled to relief, notwithstanding the fact that the contract authorized the procedures.

In applying the law to the facts in this case, we are concerned with the answer to one question: is the enforcement, by discharge, of compulsory overtime on Sunday discriminatory when, solely for religious reasons, the person discharged refuses to work on Sunday or to obtain a qualified replacement?

The defendant argues that discrimination requires a rule which applies differently to different groups, and that the compulsory overtime provision applies equally to all employees. This argument is invalid, because it is entirely possible that while a rule may apply equally to all employees, it does not have an equal impact on them. The court should look beyond the fact of the rule to determine whether it is discriminatory. See, in another context, *Renjel v. City of Lansing*, 293 F.Supp. 301 (W.D. Mich. (1968).

Rules having uniform application but a discriminatory effect against an individual's religion have been struck down before. *Sherbert v. Verner*, 374 U.S. 398 (1963), is probably the leading case in this regard. In Sherbert the plaintiff was denied unemployment compensation benefits because she refused to work on Saturday because of her religion, and was therefore "unavailable for work." The law applied equally to all, but its impact was discriminatory as to Seventh Day Adventists, such as the plaintiff. In rejecting an argument similar to that made by the defendant in this case that the rule applies equally to all, the Supreme Court, through Mr. Justice Brennan, stated at pp. 403 and 404:

> "In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '*(i)f* the purpose or *effect* of a law *is to impede the observance of one or all religious* or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only

> indirect.' *Braunfeld v. Brown,* 366 U.S. 599, 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, *but the pressure upon her to forgo that practice is unmistakable.*" (Emphasis supplied.)

The facts of Sherbert are similar to a recent Michigan case, *Swenson v. Employment Security Commission,* 340 Mich. 430 (1954). Again a provision which was applied equally had a significant impact only on Seventh Day Adventists. The application of the provision was therefore struck down.

A final example of the fallacy of defendant's argument is *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943). All school children in West Virginia were required to salute the flag, a rule which on its face is not discriminatory. But saluting the flag was forbidden by the religious beliefs of some of the students. The Supreme Court declared such a rule to be unconstitutional.

In each of these cases, as in the case at bar, the uniform application of a rule or requirement was struck down because its effect, its impact, was discriminatory.

The compulsory overtime rule of defendant, coupled with the option to obtain a qualified replacement, is not discriminatory on its face, but this is only the first step. Is the rule discriminatory in its impact? To answer the question it must first be determined what "discriminatory" means. Two definitions in the religious context are suggested, one by *Sherbert v. Verner,* supra, and one by the Equal Employment Opportunity Commission guidelines, also discussed supra. The standards suggested by these definitions will be applied to the case at bar.

In relation to Sherbert, one might question its relevance, since in that case there was "state action," while in the instant case there is only private action. That distinction would be important if this opinion were dealing with whether defendant's overtime rule is unconstitutional. But the issue before the court is whether the defendant has violated a federal statute — a statute which restricts the activities of private employers and does not require "state action." The importance of Sherbert to this analysis is not

its holding on constitutionality, but its definition of discrimination — a definition which is equally valid whether employed to measure private or state action.

The religious discrimination in Sherbert is succinctly defined at 374 U.S. 404.

> "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning of one of the precepts of her religion to accept work on the other hand."

Thus, a rule which forces a person to choose between his religion and compensation benefits is penalizing him solely because of his religion.

Applied to this case, plaintiff has been forced to choose between his religion and his job. Such a choice limits plaintiff's free exercise of his religion, and is thereby discriminatory in its effect. Applying the principles of Sherbert, the rule of defendant should not be enforced against plaintiff.

It is not necessary to rest the decision entirely on the Sherbert doctrine, however. The guidelines of the Equal Employment Opportunity Commission make it very clear what duties vis-a-vis religious beliefs are imposed upon any employer. Those guidelines are a very reasonable interpretation of the statute, and are hereby adopted as defining the requirement of the statute that an employer not discriminate on the basis of religion.

The test set forth is a twofold one: (1) the employer must make reasonable accommodations to the religious needs of its employees; (2) unless such accommodation will cause undue hardship on the conduct of the employer's business.

The evidence does not establish that a reasonable accommodation to plaintiff's religious beliefs was made by defendant. When considering plaintiff's beliefs, it must be remembered that a fundamental part of them was that plaintiff could not ask anyone else to work on Sunday, because that would be as much a sin as working himself on Sunday. There is no dispute as to the sincerity of this belief.

Requiring the employee to obtain a qualified replacement may be some accommodation to those who do not approve of Sunday work, but it is no accommodation whatsoever to those who believe, as plaintiff does, that it is a sin to induce another to commit the sin of working on Sunday. As to this sincere religious belief of plaintiff, defendant has made no accommodation.

Moving to the second half of the Equal Employment Opportunity Commission test, the defendant has not demonstrated any undue hardship. As stated earlier, full opportunity was given for any and all relevant facts to be presented. Yet the only factor tending to show hardship was that ten years ago there was some difficulty scheduling production on Sunday. This is not the type of hardship envisioned by the guidelines:

> "Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer."

Dewey's case is just the opposite. There were always several available employees who could perform his work.

The other facts cited to show hardship by defendant are not part of the stipulated facts, and are not properly before the court.

Defendant alludes to the possibility that this exception would open the door to other exceptions not based on religion. This is pure speculation which is not supported by logic. Sherbert, supra, 374 U.S. at 407. Other exceptions are not authorized, indeed mandated, by federal law. There is no reason why an accommodation cannot be made relative to religious beliefs, and limited thereto.

Thus plaintiff prevails under both definitions of discrimination. The overtime procedures of defendant, as applied, violated the Civil Rights Act of 1964.

The fashioning of a remedy presents a serious problem, because a reasonable accommodation is better worked out by agreement of the parties than by fiat of the court. For

this reason, the only affirmative relief which will be awarded at this time is that plaintiff be returned to work, with back pay from August 1, 1967.[1]

As to further accommodations which should be made in accordance with this opinion, the parties are asked to reach a solution acceptable to all concerned. Such a solution might include the defendant's obtaining qualified substitutes or a shared overtime type of arrangement whereby the people who could not work Sundays would work overtime on other days of the week.

These are merely suggestions. The parties know which types of accommodations are best suited to their particular needs. It is also suggested that the union be a party to negotiations concerning an acceptable change in the contract, so that the contract will conform to the law.

The court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of defendant's employees is properly respected and fairly accommodated.

IT IS SO ORDERED.

Dated: June 6, 1969.

Noel P. Fox
District Judge

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[1] The guidelines became effective July 10, 1967. Before the defendant was not on notice as to the meaning of the statute. But in a reasonable time after the effective date an accommodation should have been worked out. August 1, 1967 is such a time.

APPENDIX E

(In the United States District Court for the Western District of Michigan, Southern Division — No. 5889)

OPINION ON MOTIONS FOR ENTRY OF JUDGMENT AND STAY OF JUDGMENT

(Filed July 25, 1969)

The parties to this suit are before the court for entry of judgment. The court's opinion ordered plaintiff to be reinstated, with back pay and full seniority, in his job with defendant.

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, defendant employer has moved for an order staying enforcement of this judgment pending disposition of defendant's appeal to the United States Court of Appeals for the Sixth Circuit, and for fixing an amount of a supersedeas bond required of defendant.

I. *Stay of Money Judgment.*

In support of its motion, defendant first characterizes the relief granted in this case as "essentially a money judgment." Defendant then claims a stay of such a judgment as a matter of right, if accompanied by giving a supersedeas bond, pursuant to Rules 62(d) and 73(d) of the Federal Rules of Civil Procedure. Contrary to defendant's characterization, this remedy obviously involves much more than a money judgment. Reinstatement of Mr. Dewey is to be ordered, and his rights enforced by a permanent injunction. Authority for such a remedy is provided in the statute as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and

order such affirmative action as may be appropriate, which may include reinstatement * * *." 42 USCA §2000e-5(g).

The court found defendant in violation of the Act, and will proceed to fashion an effective remedy. See pages 8-11 of the court's opinion with respect to defendant's unlawful practices.

Defendant is entitled, however, to a stay of the money judgment for back pay, and this is so ordered.

II. *Stay of Reinstatement.*

Defendant is clearly not entitled to a stay of an injunction or injunctive type remedies as a matter of right. Rule 62(d) provides for stay of judgment and supersedeas bond pending appeal "subject to exceptions contained in subdivision (a) of this rule." That subdivision in turn refers to subdivision (c) for the particular rule on injunctions. This rule vests discretion in the court, sitting in equity, to stay an injunction pending appeal under such conditions it deems proper for protection of the rights of the adverse party. The court will therefore consider defendant's motion as addressed to its sound discretion, and will examine the remainder of its contentions in the light of insuring justice to the parties to this lawsuit.

Defendant urges the court to consider four factors in deciding whether to stay reinstatement: (1) whether defendant has made a strong showing that it is likely to succeed on the merits of the appeal; (2) whether defendant will suffer irreparable injury if no stay is granted; (3) whether a stay would substantially harm plaintiff; and (4) the public interest. Each of these points was, in identical or similar form, argued by the defendant in the trial of this case. Each was carefully considered at that time, and disposed of in the court's opinion.

As to point (1), defendant at this hearing sought merely to reargue its case. No new material was presented to the court. Defendant's former arguments do not, in this court's view, amount to a strong showing of success on appeal.

Point (2) was also, in substance, disposed of by the court's opinion in this case. The court found that defendant would suffer no "undue hardship," under the Equal Employment Opportunity Commission guidelines, by accommodating the religious beliefs of Mr. Dewey. The present contention that reinstatement will "irreparably harm" defendant can fare no better. For purposes of this motion, "undue hardship," and "irreparable harm" can be equated. Defendant presented no evidence of the former at trial, and the affidavit now submitted does not suffice to convince the court of the latter. Defendant's fears of injury continue to be anticipatory and based solely on speculation. The plant is not working overtime now and has not been for over eight months. Defendant's overtime schedule is entirely in the control of management. In addition, Mr. Dewey is not exempt from all overtime work. If overtime problems develop, the court has retained jurisdiction of this matter and its remedy is flexible. Accordingly, there is no hardship whatsoever to defendant in the immediate reinstatement of Mr. Dewey.

Answering point (3), the court is convinced that the only party to be irreparably harmed by a stay of this judgment would be plaintiff. Although he still has a source of income, the record shows that he is not making as much as he would were he reinstated with defendant. Occurring in one of the most inflationary periods in recent history, any wage loss involves added hardship. A stay would, in addition, threaten the skills of a die repairman. If such a skilled worker is kept from his trade, changes in modern technology lead rapidly to obsolescence of knowledge. Plaintiff also faces considerable hardship in the awesome task a person of his means faces when litigating against the corporate resources of a defendant such as Reynolds. A stay would further amplify the effective inequality of these parties. For these reasons, a stay would irreparably harm the plaintiff.

Defendant's final point concerns the public interest. Defendant foresees grave consequences to its labor bargaining position as a result of reinstating plaintiff. It argues that, because of these predicted consequences, the public interest coincides with that of the corporation. In essence, its posi-

tion is that avoiding indirect impact upon a large corporation is more consistent with public values than enforcing the constitutional rights of the individual before this court. The heart of this position is nothing more than institutional intransigence.

Defendant's position, framed as above, highlights one of the most important aspects of this case: the relationship of the individual to the overwhelming institutions of modern society. It is true that the corporation and other institutional forms are to a large degree responsible for the current prosperity of the United States. Institutions, however, often grow unsensitive to the human beings they encompass. Government itself has grown overwhelming. But we must not lose sight of the paramount rights of free individuals. Protection of these inalienable rights has been the cornerstone of national policy since the birth of this nation. The Declaration of Independence and the Fourteenth Amendment deal with the inalienable rights of individuals, not institutions. They reflect the basic theme that government and its organs are constituted by men to secure these rights to individual human beings. Congress had this in mind when it enacted Title VII of the Civil Rights Act in 1964:

> "We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well being are bargainable." 2 U.S. Cong. Adm. News '64, at page 2517.

One of these inalienable rights is freedom of religion. The First and Fourteenth Amendment to the Constitution and the Civil Rights Act look to securing this right to a single human being.

Following this clear principle, this court believes the public interest in this case to be best served by enforcing the constitutional rights of plaintiff. This is a classic case in which the government of the United States is called upon to secure the rights of a single individual. Defendant's motion to stay reinstatement is hereby denied.

The court will retain jurisdiction of this matter to insure continued protection of plaintiff's rights and provide the flexibility of an open ended remedy should a significant change of circumstances occur, especially with respect to defendant Reynolds. The court is certain that all parties involved can approach this case with the kind of reasonableness that reasonable men can bring to the management of institutions in the economic structure, and will use every effort to reach and maintain an accommodation within the framework of this remedial scheme. It will, however, be present to mediate any disputes affecting matters covered by its decree in this case, and, if necessary to issue additional orders to protect all concerned.

It should be made clear to the parties that the decree and any further action the court may take thereunder extends to individual officers and employees of defendant Reynolds. If necessary, to insure justice, the union and its officers may also be made a party.

The court believes this form of remedy necessary and appropriate to insure justice in this action. It is within the inherent equity power of District Courts to fashion effective remedies to protect federal rights. *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218, 12 L.Ed.2d 256, 84 S.Ct. 1226 (1964). The Supreme Court has encouraged imagination and flexibility in providing remedies to make effective the Congressional purpose:

> "It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded. And it is also well settled that where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *J. I. Case Co. v. Borak*, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964).

It is to fulfill this duty that the relief in this case is granted.

Engaging in Unlawful Employment Practices 42 USCA §2000e-5(g).

Defendant argues that, in order to be subject to injunctive relief under 42 USCA §2000e-5(g), supra, page 2, the court must find specific intent or purpose to discriminate against Mr. Dewey. This is not what the statute requires, either for the substantive violation or the imposition of injunctive relief. Defendant's interpretation is consistent with neither the language nor purpose of the statute. Defendant has "intentionally engaged" and plans to continue to engage in practices which had the effect of the discrimination the Act forbids:

> "It shall be an unlawful employment practice for an employer —
>
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . ." 42 USCA §2000e-2(a) (1).

It intentionally and purposely discharged Mr. Dewey for failure to work Sundays or find a replacement, and would continue to do so if this relief is not granted. By this action, defendant has intentionally engaged in an unlawful employment practice within the meaning of the above provision. Furthermore, defendant's reading of the statute would serve to foreclose effective remedies for violation of this important statute. Congress intended to prevent discrimination when it passed this Act. It must also have intended to provide effective remedies to secure protection under its provisions. Defendant's discharge of plaintiff was found to be discriminatory, and as such, must be subject to the full impact of remedies Congress has chosen to effect its purpose.

Defendant also urges that a "good faith" violation of Mr. Dewey's rights does not render it liable to relief under 42 USCA §2000-5(g). Defendant cites *Richards v. Griffith Rubber Mills*, — F.Supp — (D.C. Oreg. 1969) as authority for this contention. This court feels that it must reject the rule adopted by the Richards court. The cases relied on there as basis for a "good faith" exception dealth with

governmental and official immunity, and should not be extended to provide an insulation for private activities based on private contracts. *Dodd v. Spokane County,* 393 F.2d 330 (9th Cir. 1968); *Pierson v. Ray,* 386 U.S. 547 (1967). Such a rule would, for reasons previously mentioned, effectively emaciate Title VII.

Dated: July 25, 1969.

(s) Noel P. Fox
District Judge

APPENDIX F

(In the United States District Court for the Western District of Michigan, Southern Division — No. 5889)

JUDGMENT GRANTING PERMANENT INJUNCTION, AND REINSTATEMENT, CREDIT FOR SENIORITY AND FRINGE BENEFITS, AND BACK PAY

At a session of said Court, held in the Federal Building in the City of Grand Rapids, Michigan, on the 25th day of July, 1969.

PRESENT: Hon. NOEL P. FOX, District Judge.

THIS CAUSE having come on for final hearing and the issues therein having been tried before the Court without a Jury and the evidence of all the parties hereto having been heard, and the Court having duly made findings of fact and conclusions of law in its Opinion rendered on the 6th day of June, 1969 in accordance with Rule 52(a) of the Rules of Civil Procedure,

NOW THEREFORE, on this 25th day of July, 1969, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the Defendant, Reynolds Metals Company, is ordered to reinstate the plaintiff, Robert Kenneth Dewey, forthwith, to the job classification he held at the date of his discharge, September 12, 1966, and that Plaintiff be reinstated with full seniority that would have accrued and inured to his benefit if he had not been discharged. FURTHER, that the Plaintiff be made whole upon reinstatement by receiving full credit for all fringe benefits that would have accrued and inured to his benefit if he had not been discharged.

2. The Defendant, Reynolds Metals Company, its employees, agents, servants, attorneys, and privies, and each of them are hereby permanently enjoined and restrained from requiring the Plaintiff, Robert Kenneth Dewey, to perform work for the Defendant on Sundays.

3. The injunctive relief provided in Paragraph 1 and 2 of the Judgment is granted in accordance with and pursuant to Title VII of the Civil Rights Act of 1964, Section 706(5)(g), 42 USC Section 2000e-5(g), and Rule 65(d) of the Rules of Civil Procedure for the United States District Courts, for the following reasons:

(a) In discharging Plaintiff, Defendant violated Title VII of the Civil Rights Act of 1964 in discriminating against Plaintiff because of Plaintiff's religion.

(b) In assigning Sunday overtime work to Plaintiff, Defendant failed to reasonably accommodate the religious needs of Plaintiff and Defendant has not demonstrated that undue hardship on the conduct of Defendant's business would result from accommodating Plaintiff's religious beliefs concerning his working on Sunday and concerning his inducing another person to work on Sundays.

(c) Reinstatement is a remedy specifically permitted by the Act and is necessary to avoid irreparable harm to the Plaintiff and such remedy will not cause undue hardship on the conduct of the Employer's business.

4. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff recover from the Defendant back pay. Said Judgment for back pay shall relate to a period of time from August 1, 1967, through and including the date of reinstatement. Said amount is determined to be $7,286.92 for that period of time from August 1, 1967, through June 6, 1969. Upon reinstatement of the Plaintiff, there shall be added to this amount, an amount which represents the Plaintiff's lost wages from June 6, 1969, to the date of reinstatement. Said amount shall be determined by subtracting the Plaintiff's actual income earned during said period of time from an income average of the income earned by the two employees in the die repair classification, one whose seniority is immediately senior to the Plaintiff, and one whose seniority is immediately junior to the Plaintiff for said period of time. In determining said income average,

no income earned on Sundays shall be included in arriving at said average.

5. The Court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of Defendant's employees is properly respected and fairly accommodated; and for the further purpose of providing the parties a forum in which to seek recourse should circumstances change with respect to the effect of reasonable accommodation of Plaintiff's religious beliefs upon the conduct of the Employer's production schedules and Management-Labor relations.

The reasons for retaining jurisdiction and for the injunctive relief are set out in the Court's opinion dated June 6, 1969 as follows:

> "Moving to the second half of the Equal Employment Opportunity Commission test, the Defendant has not demonstrated any undue hardship. As stated earlier, full opportunity was given for any and all relevant facts to be presented. Yet the only factor tending to show hardship was that ten years ago there was some difficulty scheduling production on Sunday. This is not the type of hardship envisioned by the guidelines:
>
> > 'Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer.'
>
> "Dewey's case is just the opposite. There were always several available employees who could perform his work.
>
> "The other facts cited to show hardship by Defendant are not part of the stipulated facts, and are not properly before the Court.
>
> "Defendant alludes to the possibility that this exception would open the door to other exceptions not based on religion. This is pure speculation which is

not supported by logic. Sherbert, supra, 374 U.S. at 407. Other exceptions are not authorized, indeed mandated, by federal law. There is no reason why an accommodation cannot be made relative to religious beliefs, and limited thereto.

"Thus plaintiff prevails under both definitions of discrimination. The overtime procedures of defendant, as applied, violated the Civil Rights Act of 1964.

"The fashioning of a remedy presents a serious problem, because a reasonable accommodation is better worked out by agreement of the parties than by fiat of the court. For this reason, the only affirmative relief which will be awarded at this time is that plaintiff be returned to work, with back pay from August 1, 1967.[1]

"As to further accommodations which should be made in accordance with this opinion, the parties are asking to reach a solution acceptable to all concerned. Such a solution might include the defendant's obtaining qualified substitutes or a shared overtime type of arrangement whereby the people who could not work Sundays would work overtime on other days of the week.

"These are merely suggestions. The parties know which types of accommodations are best suited to their particular needs. It is also suggested that the union be a party to negotiations concerning an acceptable change in the contract, so that the contract will conform to the law.

"The court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders

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[1] "The guidelines became effective July 10, 1967. Before then defendant was not on notice as to the meaning of the statute. But in a reasonable time after the effective date an accommodation should have been worked out August 1, 1967 is such a time."

are necessary to insure that the religion of defendant's employees is properly respected and fairly accommodated."

6. IT IS FURTHER ORDERED THAT enforcement of this Judgment shall be stayed for ten (10) days after entry of this Judgment.

NOEL P. FOX
District Judge

APPENDIX G

No. 19746

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Appeal from United States District Court for the Western District of Michigan

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ROBERT KENNETH DEWEY,
Plaintiff-Appellee,

v.

REYNOLDS METALS COMPANY,
Defendant-Appellant.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed June 4, 1970)

Before WEICK and COMBS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. The action in the District Court was brought under the provisions of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e.

Plaintiff's (Dewey's) claim was that he was wrongfully discharged by his employer, the defendant, Reynolds Metals Company (Reynolds), because of his religious beliefs, and he prayed for reinstatement with back pay.

Prior to bringing the action, Dewey filed grievances with Reynolds on the identical claim set forth in his complaint, under the provisions of a collective bargaining agreement entered into by Reynolds with Local 277, United Automobile Aerospace and Agricultural Workers of America, AFL-CIO (UAW), which was the bargaining representative of Reynolds' employees. Dewey was a member of UAW. The grievances were processed and resulted in their submission to a mutually agreeable arbitrator, who made an award denying them on June 29, 1967.

Contemporaneously with the submission of the grievances, Dewey made application to the Michigan Civil Rights Commission for issuance of a complaint against Reynolds, alleging discrimination on account of his religious beliefs.

The following is a Summary of Findings and Order of Dismissal, entered by the Commission on December 13, 1966:

> "The findings indicate that the claimant, despite due notice of overtime requirements by the company and the applicable Collective Bargaining Agreement provisions, continued to refuse to perform scheduled overtime work on Sundays and took the position that his right to continued employment while following his religious belief without interference was an absolute right.
>
> "The Commission has previously ruled that where the normal work week and foreseeable overtime requirements are prescribed in a Collective Bargaining Agreement, that absent or (sic) intent on the part of respondent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs.
>
> "The investigation did not reveal any intent on the part of the respondent to discriminate on religious grounds and it is, therefore, recommended that this application for the issuance of a complaint be denied for lack of probable cause.

ORDER OF DISMISSAL

> "The Commission has found insufficient grounds on which to issue a Complaint and, therefore, the above Application is herewith denied. This Order of Dismissal shall automatically become effective within 15 days from the date of mailing unless the Claimant shall demand a hearing prior thereto." (App. 93a-94a)

Dewey requested the United States Office of Federal Contract Compliance to review his charges of religious discrimination, and that office found no basis for a charge of discrimination.

On January 4, 1967, Dewey filed a charge with Equal Employment Opportunity Commission (EEOC), claiming religious discrimination. The Commission, on January 5, 1967, contrary to the recommendation of its Regional Director that the Commission find no probable cause, determined that there was reasonable cause to believe that Reynolds had engaged in unlawful employment practices and authorized the bringing of the present action in the District Court. Reynolds moved for dismissal of the complaint filed in the District Court on the grounds that the arbitrator's award was a final adjudication of the grievances and that they could not be relitigated. The District Judge, in a memorandum opinion, denied the motion to dismiss. 291 F.Supp. 786 (W.D. Mich. 1968).

Reynolds then answered, denying it discriminated against Dewey on account of his religion and pleaded provisions of the collective bargaining agreement which required employees to perform all straight time and overtime work required of them by the company. Reynolds further alleged that Dewey refused to perform overtime work on Sundays or to arrange for another qualified employee to replace him, basing his refusal on his religious convictions. Reynolds, after giving warnings and a three-days' layoff, finally discharged Dewey under its plant rules for his continued refusal to comply with the provisions of the collective bargaining agreement.

The parties stipulated the facts and the case was tried by the Court without a jury. In a memorandum opinion, the District Judge ruled in favor of Dewey. He ordered Reynolds to reinstate Dewey with back pay and enjoined Reynolds from requiring Dewey to work on Sundays. 300 F.Supp. 709 (W.D. Mich. 1969). The District Court refused to stay execution on the reinstatement pending appeal, and required Reynolds to post a $15,000-bond to stay execution on the judgment of $7,286.92 for back pay. 304 F.Supp. 1116 (W.D. Mich. 1969). Reynolds appealed. We reverse.

The applicable statute is 42 U.S.C. § 2000e-2(a), which provides as follows:

> "(a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . ."

The legislative history of the statute is clear that it was aimed only at discriminating practices. Congressional Record, Vol. 110, pages 13079-13080, June 9, 1964.

In order to prove a violation of the Act it was incumbent on Dewey to establish by a preponderance of the evidence that his employer discriminated against him on account of his religion. In 1964 U.S. Code Cong. & Adm. News, page 2515, it is stated:

> "A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary. . . . In addition, we believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in all district court proceedings together with the necessity of the Commission

proving discrimination by a preponderance of the evidence."

On page 2516 it is stated:

> "Similarly, management prerogative and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices."

Reference to the collective bargaining agreement indicates rather clearly that the provisions with respect to straight time and overtime work apply to all employees equally and do not discriminate against Dewey or any other employee.

Reynolds operated a "job type" plant, producing, on order, aluminum extrusions and billets. It was necessary therefore for production to be scheduled to meet delivery dates provided for in contracts with customers.

Prior to the 1960 collective bargaining agreement, overtime was performed by employees on a voluntary basis. As a result thereof, with an increase in orders it became impossible to schedule production on Saturdays and Sundays. In order to remedy this difficulty, Reynolds negotiated with UAW the 1960 and 1965 collective bargaining agreements which provided that the company had the right to set straight time and overtime schedules and the employees were obligated to work such schedules unless they had a substantial and justifiable reason for not doing so. The 1965 agreement provided:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the Company except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

The agreement provided time and one-half for work on Saturdays and double time for work on Sundays.

The agreement further provided that overtime work shall be divided as equally as possible. If more employees are needed they are assigned in the inverse order of their seniority. Reynolds also issued an interpretation that any employee assigned to overtime could be relieved from the assignment simply by arranging for another qualified employee to replace him. This system was used extensively.

Dewey had been employed by Reynolds in various capacities since 1951, and at the time of his discharge, on September 12, 1966, was a die repairman. Since 1961 Dewey has been a member of Faith Reformed Church. He never volunteered for overtime work on Sunday after joining the church, although he did volunteer for other days.

Dewey was scheduled to work on Sunday, November 21, 1965. He refused to work because of his religious beliefs. He was given a warning and informed as to the necessity of a seven-day operation and was advised that a repetition would lead to disciplinary action under Plant Rule 11, which prohibits "absence from work without reasonable cause", and provides a three-offense progression of punishment with discharge for the third offense.

Between January and August, 1966, Dewey was scheduled to work on five Sundays. He obtained replacements as provided in the contract. On August 28, 1966, he was scheduled again to work on Sunday, and he not only refused to work but also refused to obtain a replacement on the ground of his religious beliefs. The arbitrator found:

> "(Dewey, it will be recalled, accelerated his disciplinary timetable by telling Zagman [a fellow employee] not to serve as a replacement any more.)"

On September 4, 1966, Dewey refused to work or to obtain a replacement. He was given a written warning and a disciplinary layoff of three days. Again he refused to work or to obtain a replacement on September 11, 1966, and was discharged for violation of Plant Rule 11.

We find nothing discriminatory in the provisions of the collective bargaining agreement or in the manner in which Reynolds executed it. In our opinion, it provided a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of them.

The District Judge found that the compulsory overtime provision of the collective bargaining agreement "is not discriminatory on its face." We agree. However, he said this is only the first step. He found it was discriminatory in its impact. We disagree. He relied on *Sherbert v. Verner*, 374 U.S. 398 (1963); but this case involved state, and not private action.

In reaching his decision that the collective bargaining agreement discriminated against Dewey, the District Judge applied retroactively Regulation 1605.1, adopted by EEOC effective July 10, 1967; which was nearly ten months after Dewey had been discharged and after the arbitrator and the Michigan Civil Rights Commission had rejected Dewey's charges.

In our opinion, it would have been more appropriate for the District Court to have applied the EEOC Regulation 1605.1 which was in force at the time of Dewey's discharge, and which became effective June 15, 1966.

The 1966 regulation contained the following provisions which restricted any obligation upon the part of the employer to accommodate to the reasonable religious needs of his employees:

Section 1605.1(a):

> "(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he

requires that all his employees be available for work on Saturday."

Section 1605.1(b):

"(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

The 1967 regulation, retroactively applied by the District Court, omitted the above quoted language and other material parts of the 1966 regulation, and instead of providing definite guidelines for the assistance of employers who might be affected, left the matter largely on an *ad hoc* basis for the decision of the Commission on the particular facts of each case.

It is clear that Reynolds complied with the 1966 regulation. The obligations contained in the collective bargaining contract, which were lawful under the regulations of EEOC then in effect, ought not to be impaired by the application of a subsequently passed inconsistent regulation.

The District Judge took into account his *ex post facto* application of the 1967 EEOC regulation by starting Dewey's back pay from August 1, 1967, instead of from the date of his discharge; holding that this date was a reasonable time after the 1967 regulaton became effective for the company to work out accommodation to it. The trouble with this treatment is that Dewey was no longer in the employ of Reynolds. Having a lawful right at the time to discharge Dewey under the 1966 regulations, Reynolds ought not to be required to re-employ him at a later date and pay his back salary merely because EEOC decided to change the rule by adopting new, inconsistent regulations. The rights of Dewey and Reynolds were governed by the law

in effect at the time of the discharge. EEOC could not affect these rights by subsequently adopting a new regulation.

The Act further provides:

> "No order of the court shall require . . . the hiring, reinstatement or promotion of an individual employee, or the payment to him of any back pay, if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3 (a) of this title." 42 U.S.C. § 2000e-5(g).

The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees. The violation consisted not only of his refusing to work on Sundays, but also his refusing to arrange for a replacement, which was an alternate procedure. He did arrange for five replacements, but later refused even to do this, claiming that it was a sin. He apparently did not regard it as sinful for him to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.

To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among the employees, and could create chaotic personnel problems and lead to grievances and additional arbitrations. The practice of permitting the employee, rather than the employer, to secure the replacement served to insulate the employer against any charge of unequal naming of replacements.

But even if the 1967 regulations are applied, we think that Reynolds complied with Section 1605.1(b) thereof by making a reasonable accommodation to the religious needs of its

employees when it permitted Dewey, by the replacement system, to observe Sunday as his Sabbath.[1] He stubbornly refused to exercise this privilege. The finding of the District Court that Reynolds did not make reasonable accommodations to the religious needs of Dewey is not supported by substantial evidence and is clearly erroneous. Rule 52-(a) Fed.R.Civ.P.

The District Court referred to the inalienable right of freedom of religion, which he said is protected by the First and Fourteenth Amendments to the Constitution and the Civil Rights Act. The employer did not question Dewey's right to freedom of religion; Reynolds did question Dewey's right to practice his religious beliefs on it and to interfere with the operation of its plant.

An additional defense is provided in the first sentence of 42 U.S.C. § 2000-5(g), which provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)."

This section of the statute requires a finding that the employer has intentionally engaged in an unlawful employ-

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[1] It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.

ment practice before the court may award relief. *Richards v. Griffith Rubber Mills,* 300 F.Supp. 338, 341 (D. Ore. 1969).

It can hardly be said that Reynolds intentionally violated the Act when no discrimination was found by either the Michigan Civil Rights Commission, the Office of Federal Contract Compliance, the arbitrator chosen by agreement of the parties, or the Regional Director of the EEOC in Cleveland. In addition, in order to support his finding of an unlawful employment practice, the District Judge had to apply regulations adopted subsequent to the employee's discharge and ignore those in force at the time the alleged violation took place. The finding of the District Court that there was an intentional violation of the Act is not supported by substantial evidence and is clearly erroneous. Rule 52(a) Fed.R.Civ.P.

Effect of the Arbitration

It is clear that if the arbitrator of the grievances had granted an award to Dewey, instead of to Reynolds, the award would have been final, binding and conclusive on Reynolds. Reynolds would not have been permitted to relitigate the award in the courts. This is the teaching of the United Steelworkers trilogy, which clearly defined the respective functions of the courts and the arbitrator. *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 to 602 (1960); *Washington v. Aerojet-General Corp.,* 282 F.Supp. 517 (C.D. Cal., 1968).

In *Steelworkers,* the Court said:

> "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." (*Id.* at 569)

The arbitrator had jurisdiction to determine the grievances. The arbitration involved an interpretation of the collective bargaining agreement with respect to Dewey's claims that he had been laid off and discharged because of his religious beliefs. In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where

the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.

This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, *i.e.*, that the awards are binding on them but not on their employees.

The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration.

In the supplemental brief of EEOC as amicus curiae, the case of *Smith v. Evening News*, 371 U.S. 195, 197-198 (1962), is cited for the proposition that "the complainant is not required to elect between his contractual rights or his statutory rights but may seek to vindicate his claim in contractual and statutory proceedings." (EEOC Supp. Brief, p. 3) The writer of the brief neglected to state that the collective bargaining agreement in *Evening News* contained no grievance arbitration procedure which had to be exhausted before recourse could be had to the courts. 371 U.S. 196, fn 1.

The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court *after* the grievance has been finally adjudicated by arbitration.

We see no good analogy between jurisdiction of the National Labor Relation Board and that of EEOC. The Labor Board has adjudicatory powers over unfair labor practices, subject only to judicial review. Orders of the Board may be vacated on review only when they are not supported by substantial evidence upon consideration of the record as a whole. EEOC, on the other hand, has no such power. The District Court considers EEOC cases de novo. The legisla-

tive history, from which we have previously quoted, indicates the reason for the difference.

Nor do we find any national policy for ousting arbitrators of jurisdiction to finally determine grievances initiated by employees, based on alleged violation of their civil rights.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

COMBS, Circuit Judge, dissenting. I respectfully dissent. In my opinion the District Court correctly concluded that the company had not complied with Title VII of the Civil Rights Act in that it failed to make reasonable accommodation to Dewey's religious beliefs.

The Equal Employment Opportunity Commission was formed to further the purposes of the Act, 42 U.S.C. § 2000 (e)-4, and was granted power to promulgate regulations consistent with the provisions of the Act. 42 U.S.C. § 2000 (e)-12(a). The Commission's interpretation of the Act is persuasive although not binding on this Court. It was said in *Udall v. Tallman*, 380 U.S. 1, 16 (1965): "[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration," citing *Unemployment Commission v. Aragon*, 329 U.S. 143, 153 (1946); *Gray v. Powell*, 314 U.S. 402 (1941); and *Universal Battery Co. v. United States*, 281 U.S. 580 (1930).

Pursuant to its statutory authority, the Commission issued Regulation Section 1605.1, effective July 10, 1967, which provides, inter alia:

> "(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. . . .
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer

has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."

As the majority opinion correctly points out, the 1967 Regulations were not in effect at the time of Dewey's discharge. However, the 1966 Regulations, which were in effect at that time, also provided that "the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodations can be made without serious inconvenience to the conduct of the business." It is thus apparent that the cornerstone of both the 1966 and 1967 Regulations is the obligation of the employer to accommodate the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

This is a reasonable interpretation of the Act. So, the test is whether the company has made reasonable effect to accommodate Dewey's religious beliefs. The only accommodation to which the company points, in addition to requesting volunteers, is the privilege extended to Dewey to obtain replacement for his Sunday overtime assignments. The majority views the existence of this privilege as a reasonable accommodation to Dewey's religious needs, and notes that "he stubbornly refused to exercise this privilege." This "stubborn" refusal on Dewey's part was grounded in his belief that working on Sunday is inherently wrong and that it would be a sin for him to induce another to work in his place. The replacement system was therefore a solution to Dewey's problem. There is a significant failure by the company to show that it could not have obtained a replacement for Dewey without hardship or inconvenience. There is also no showing that Dewey's failure to work himself or to obtain a replacement would have seriously disrupted work schedules or internal discipline. I find no support in the record for the assertion in the majority opinion that to grant Dewey's request would cause "chaotic personnel problems and lead to grievances and additional arbitrations." I think the company has

completely failed to show that Dewey's refusal to work on Sunday would create undue hardship on the conduct of its business.

Nor am I impressed with the argument that to grant Dewey's request would necessarily affect the company's contractual right to require overtime work. No evidence was adduced on this point. The company may not stand flat-footedly on its contractual right to require overtime work. Provisions of the contract must give way to constitutional mandates and valid statutory enactments. The First Amendment right to freedom of religion has always been recognized as one of the Bill of Rights' strongest mandates. Even though this right has not been extended into the field of labor relations, section 703(a)(1) of the Civil Rights Act is a Congressional directive that reasonable accommodation should be made by management to the religious beliefs of employees when this can be done without undue hardship on the employer. The District Judge did not apply the First and Fourteenth Amendments to the bargaining agreement here involved, but placed his reliance on Title VII of the Act and specifically stated that he did not find it necessary to reach the question whether plaintiff's constitutional rights had been violated.

Lastly, I am unable to agree that Dewey made an election of remedies by first pursuing the grievance procedure under the bargaining agreement and that he is thereby precluded from maintaining this action. Dewey's rights under the collective bargaining agreement and those created by Title VII of the Act are separate and distinct. The election of remedies doctrine therefore does not apply. See *Bowe v. Colgate Palmolive Company*, 416 F.2d 711 (7th Cir. 1969); *Bankers Trust Co. v. Pacific Employers Ins. Co.*, 282 F.2d 106, 110 (9th Cir. 1960). The Seventh Circuit held in *Bowe* that a plaintiff suing under 42 U.S.C. §2000(e) could "utilize dual or parallel prosecution both in court and through arbitration so long as erection of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs."

I would affirm the judgment.

APPENDIX H

(In the United States Court of Appeals for the Sixth Circuit — No. 19746)

ORDER

A majority of the Judges of this Court having voted against a rehearing en banc, it is ORDERED that the petition for rehearing be referred to the panel for final disposition. Judges Edwards and McCree voted in favor of a rehearing en banc.

Entered by order of the Court.

(s) Carl W. Reuss
Clerk

APPENDIX I

(In the United States Court of Appeals for the Sixth Circuit — No. 19746)

OPINION ON PETITION FOR REHEARING

Before WEICK and MCCREE*, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. It is contended that we have adopted a narrow construction of the Civil Rights Act and the Regulations adopted by EEOC thereunder. We submit that we have not. The legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. The plain language of the statute, Section 2000e-2(a) of Title 42, is susceptible of no other meaning.

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.

The collective bargaining agreement, by which *all* employees were obligated to perform straight time and overtime required of them by the company, was equally and uniformly applied to all of the employees, and it discriminated against no one.

To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede

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* Judge McCree was designated by the Chief Judge as the third member of the panel, to take the place of Judge Combs who resigned as a member of the Court on June 5, 1970, prior to the filing of the petition for rehearing. The designation was made in order that Judge McCree may file a dissent expressing his views.

to or accomodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its relations with religious believers and nonbelievers, must be neutral. The Government is without power to support, assist, favor or handicap any religion. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Everson v. Board of Educ.* 330 U.S. 1 (1947); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

In *Braunfeld v. Brown*, 366 U.S. 599 (1951), the Court upheld a state Sunday Closing Law against the contention that it operated to prohibit the free exercise of appellant's religion which observed Saturday as the Sabbath.

No one disputes Dewey's right to his religious beliefs. The question is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant. As Mr. Justice Douglas pointed out in his concurring opinion in *Sherbert v. Verner*, 374 U.S. 398 (1963), the religious beliefs of individuals may take on many forms. He mentioned specifically only a few, including Moslems, who attend a mosque on Friday and pray five times daily; Sikh, who carry a symbolic or regular sword; Quakers who affirm instead of swearing; and Seventh Day Adventists, who observe Saturday as Sabbath and eat only certain meats.

The arbitrator in his award stated that an employee might even join a religious organization which observed Wednesday as Sabbath.

It is argued that under EEOC Regulations the employer is required to make only reasonable accommodations to the religious needs of his employees. The employee may claim that all of his religious needs are reasonable, irrespective of discrimination, and file charges with EEOC against his employer for failure to accomodate them. An employer with thousands of employees could certainly be harassed by the filing of many of such claims. This would also present serious problems for labor organizations to cope with.

Congress did not intend that employers or labor organizations should be harassed with respect to claims not involving discrimination. In the legislative history of the Act it is stated:

> "Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." 1964 U.S. Code Cong. & Adm. News, at 2516.

The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.

Dewey entered the employ of Reynolds before he acquired his religious beliefs. The 1960 collective bargaining agreement was also entered into prior to that time. After he acquired his religious beliefs, his employer did endeavor to make accommodation to the religious beliefs of its employees by interpreting the agreement so as to permit any employee assigned to overtime to be relieved from the assignment simply by arranging for another qualified employee to replace him. We hold that this was a reasonable accommodation.

Dewey, with no difficulty, did arrange for replacements on five different occasions, and then he decided not only that it was a sin for him to obtain a replacement, but the arbitrator found specifically that Dewey told his replacement, Zagman, "not to serve as a replacement any more."

While it was stipulated that Dewey was sincere in his beliefs, he offered no proof that the tenets of his church forbade his designating a replacement to serve in his place on Sundays. The fact that he was sincere in his beliefs gave him no greater rights.

Moreover, the retroactive application of the 1967 Regulations to the 1966 discharge is justified by EEOC in its amicus brief, with the assertion that its Regulations are only "interpretations" and that "the timing of the Commission interpretations is irrelevant" since the 1966 Regu-

lation is now a "defunct Commission guideline." Although defunct in 1967, it was certainly in full force and effect in 1966 and authorized the employer to prescribe

> "the normal work week and foreseeable overtime requirements and absent an intent to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reasonable grounds to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

Dewey did not acquire his religious beliefs until after his employer had entered into the 1960 collective bargaining agreement which required all employees to work overtime. Dewey thus had actual knowledge that the requirements of the collective bargaining agreement would conflict with his subsequently acquired religious needs. Under the regulations in force at the time, which EEOC claims are now defunct, the employer was under no obligation to accommodate. There was no claim that the employer intended to discriminate on religious grounds. These regulations had the force and effect of law. Their subsequent repeal, after the discharge, ought not to affect the rights or obligations of either party.

The simple answer, however, to all of Dewey's claims is that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, discriminating against no one.

Effect of the Arbitrator's Award

The case of *Culpepper v. Repnolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970), is relied on in support of the proposition that an employee may utilize both arbitration and an action under Title VII of the Civil Rights Act. In *Culpepper*, however, only a grievance was filed, which was never processed through arbitration. *Culpepper* involved racial discrimination, which a majority of the panel thought was so serious as to impose —

". . . the duty on the courts to make sure that the Act works . . ."

Circuit Judge Coleman, who filed a concurring opinion, disagreed rather vigorously that any such duty was imposed on the Courts. He stated:

> "Under our Constitutionally ordained form of Government, whether an Act works or fails is the concern of the Executive or Legislature, or both — not the courts."

We do not regard it as our function to enlarge on the plain language of a statute so as to impose on citizens obligations never intended by Congress, in order to make it work.

Great reliance is placed upon *Hutchings v. United Industries, Inc.*, ... F.2d ..... (5th Cir. 1970), which was decided after our decision in the present case was announced. In our opinion *Hutchings* does not comport with *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, ... U.S. ..... (1970), 38 U.S.L. Week 4462.

In *Boys Markets*, Mr. Justice Brennan emphasized the importance of arbitration in the settlement of labor disputes. He said:

> "However, we have frequently noted, in such cases as *Lincoln Mills*, the *Steelworkers Trilogy*, and *Lucas Flour*, the importance which Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as means to this end. Indeed, it has been stated that *Lincoln Mills*, in its exposition of § 301(a), 'went a long way towards making arbitration the central institution in the administration of collective bargaining contracts.'
>
> "The *Sinclair* decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices.

> Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly effacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." [footnote omitted].

Similarly, employers would be wary of arbitration clauses in collective bargaining agreements if, as in the present case, the arbitration is binding on them only and not on their employees.

Our case is even stronger than *Boys Markets* because the grievance here was submitted to arbitration and the arbitrator made an award which was final, binding and conclusive on the parties. It is as binding as a judgment. 5 Am.Jur.2d, ARBITRATION AND AWARD, § 147. It remains in full force and effect.

The amicus brief of NAACP Legal Defense Fund candidly recognizes that "[i]t may be true that the result of such an accommodation will be that the employer but not the employee will be bound by the decision of the arbitrator." (Brief, p. 14).

We know of no good reason why an award of an arbitrator should not be binding on both parties, the same as a judgment of a court.

It is difficult for us to believe that any employer would ever agree to arbitration of a grievance if he knew that the employee would not be bound by the result.

The importance of arbitration in the resolution of all labor disputes is the theme of the *United Steel Workers Trilogy*, 363 U.S. 564-602 (1960). The purpose of arbitration is thwarted if the awards are held by the courts to be binding on employers only and not on employees.

The petition for rehearing is denied.

McCree, Circuit Judge (dissenting). I would grant the petition for rehearing and affirm the judgment of the District Court for the reasons stated in the dissenting opinion of Judge Combs. Furthermore, I observe that in addition to the Seventh Circuit, *Bowe v. Colgate-Palmolive Co.*, 416

F.2d 711 (1969), the Fifth Circuit has held that appellee's invocation of the grievance-arbitration procedure did not bar him from proceeding in the District Court under Title VII of the Civil Rights Act. *Hutchings v. United States Industries, Inc.*, No. 28750 (5th Cir. June 19, 1970).